IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

SUIT NO. 1849 OF 1989

1. NAZMABEGUM widow of Abdul Samad)
Shaikh of Bombay Indian)
Inhabitant, age 36 years,)
occupation household work,)
widow of the deceased Plaintiff.)

2. SHAIKH SANWAR HUSSAIN)
son of Abdul Samad Shaikh,)
age about 17 years, Occupation)
Nil, son of the deceased)
Plaintiff.)

3. SHAIKH KAMAL son of Abdul)
Samad Shaikh, age 16 years,)
occupation nil, son of the)
deceased Plaintiff.)

4. SHAIKH NASIR HUSSAIN son of)
Abdul Samad Shaikh, age 14)
years, occupation nil, son)
of the deceased Plaintiff.)

5. SHAIKH ALIHUSSAIN son of)
Abdul Samad Shaikh, age 12)
years occupation student,)
son of the deceased Plaintiff.)

6. ASHA BEGUM daughter of Abdul)
Samad Shaikh, age 9 years,)
occupation nil, daughter of)
deceased Plaintiff.)

7. SHAIKH ABDUL QUADER son of)
Abdul Samad Shaikh, age 7 years)
occupation student, son of the)
deceased Plaintiff)
Plaintiff Nos. 2 to 7 minors by)
their natural guardian mother)
Nazmabegum Abdul Samad Shaikh,)
all residing at the above)
address applicants are the)
only Legal heirs of the)
deceased Plaintiff.)
residing at 10/A/1, Durlabh)
Bhawan, C Block, Jalbai Estate,)
Charni Road, Bombay 400 004.)..PLAINTIFFS

VERSUS

1a. MANI BURJORJI POCHKHANAWALLA)
1b. KETAYAM CYRUS PITHAWALA)
claiming to allged legal)
heirs and alleged be)
residing at Durlabh Bhavan,)
'C' Block Ground Floor,)
Jalbhai Street, Mumbai-4.)..DEFENDANTS

Mr.H.S.S.Murthy i/b. S.S.Tammanavar for Plaintiffs.
Mrs. V.V.Thorat for Defendants.

CORAM: S.K.SHAH,J.
JUDGMENT RESERVED ON: 23rd June,2005.
JUDGMENT PRONOUNCED ON: 06th JULY,2005.

ORAL JUDGMENT :

1. This is a suit for declaration that the plaintiff is entitled for possession of the suit premises in his own right as against the defendant and for possession of Room Nos.2 and 3 of suit premises, being tenement No.10/A/1.

2. The plaintiffs allege that the tenement No.10/A/1 consists of three rooms having a total area of about 18 1/2' x 28' situate on the ground floor of the

building known as "Durlabh Bhawan" at Jalbai Estate, Charni Road, Bombay. The said tenement was held by the original plaintiff on joint tenancy basis with right of survivorship with his brother who died in or about 1984 and as such the original plaintiff became the sole tenant. The Plaintiffs allege that the original defendant claimed to be the brother of one Feroze Mallu who was earlier occupying the room adjacent to the suit premises and that room was numbered as 10/B/2 on the ground floor of the said building. The said Feroze Mallu died on or about 16.7.1988.

3. The Plaintiffs further allege that in the year 1979, the original plaintiff had filed the Suit in the Bombay City Civil Court, being Suit No.5283 of 1979 against Feroze Mallu for restraining him from entering upon the suit premises and interfering with the repair work being carried out in respect of one room of the suit premises as the original defendant was trying to take advantage of the same and was falsely claiming that the original plaintiff was possessing only one room. The plaintiffs further allege that in the year 1980, the mother of the original plaintiff acquired tenancy rights in respect of Room No.10/B/2 which was in the name of late Feroze Mallu. As such, the landlords transferred the rent receipts in the name of

the mother of the original plaintiff. They further allege that Feroze Mallu was a bachelor and he was aged and ailing and, therefore, did not require whole room. It is further alleged that the landlords suggested that the original plaintiff should allow the ailing Feroze Mallu to accomodate one cot in the tenement occupied by the original plaintiff, i.e. the suit premises. Accordingly, such arrangement was made purely on humanitarian grounds and, therefore, Feroze Mallu had surrendered possession of Room No.10/B/2 to the landlords who, in turn, handed it over to the original plaintiff's mother.

4. The plaintiffs further allege that the B.M.C. had issued a notice under Section 351 of the B.M.C. Act alleging that walls of the Room No.10/A/1 were constructed illegally. The original plaintiff had challenged that notice in the Bombay City Civil Court by a suit No.6033 of 1979. It is further alleged that the suit structure was regularised by the B.M.C. with the intervention of the Corporator.

5. The plaintiffs allege that the original plaintiff and his brother have been in possession of the suit premises as tenants. Two months after the death of Feroze Mallu on 16.7.1988, the defendants came on the scene along with the police falsely claiming that the

original plaintiff had broken open some lock on the room allegedly used by Feroze and on that count a complaint was lodged with the police and the police had arrested the original plaintiff on the charge for offences under sections 451, 454 and 457 of the I.P.C. The plaintiffs allege that there was conspiracy to snatch away the suit premises from him by the defendant. The plaintiffs allege that the original plaintiff was a lawful tenant of the suit premises and was in exclusive and continuous possession thereof since 1979. The original defendant was a rank trespasser in the suit premises and as the defendant tried to take illegal possession through police, he filed this suit for the aforesaid reliefs.

6. The original defendant resisted the suit by his written statement dated 8.4.1994 which has been adopted by the present defendants. While denying that the suit tenement consists of the rooms having total area of 18 1/2 x 28. The defendants contend that the suit premises which bears Room No.10/A/1 consists only of one room admeasuring approximately 80 sq. ft. The defendant is in possession of rent receipts issued to the defendants' deceased brother. The defendants contend that original defendant and his brother were in possession and occupation of two rooms bearing No.10/A/2 and 10/C/2 and not merely one room. They

contend that the original plaintiff had taken out Notice of Motion in his suit no.5283 of 1979. However, the same was decided against the plaintiffs on evidence. The plaintiffs had appealed against that decision. However, the said Appeal also was dismissed. They contend that it is the plaintiff who had trespassed on the premises occupied by the deceased brother of the defendant who was old and feeble. They contend that the intention of the original plaintiff was to usurp the defendant's two rooms by hook or crook. They further contend that on the death of Feroze Mallu, his brother had been in possession of the two rooms and he had put his lock to the two rooms. They denied creation of any tenancy in favour of the deceased plaintiff's mother with regard to room No.10/B/2 in the year 1980. They contend that Room No.10/A/1 was carved out of the original room belonging to deceased defendant's brother Feroze Mallu.

7. The defendants further contend that the said building was under repairs by the Repair Board and a part of the room occupied by Feroze Mallu was taken up by the contractor for storing material. The said contractor had erected a temporary wall for that purpose. They further contend that after repairs were completed, the said temporary wall continued to remain

there and taking advantage of that situation one of the trustees of the landlord trust usurped the suit premises by allowing the plaintiff to put a permanent wall and convert the same into a small room. It is thereafter that the plaintiff filed the false suit No.5283 of 1979 in which the plaintiff himself gave the dimension of the room in original plaintiff's occupation as 7 1/2' x 17'. The defendants further contend that the plaintiff again forcibly constructed the said wall with regard to which the Bombay Municipal Corporation had given notice under Section 351 of the B.M.C. Act and got the said wall regularised subsequently. They contend that after the death of Feroze Mallu, his brother was in occupation of two rooms occupied by deceased brother. They contend that in absence of the defendant, the plaintiff broke open the lock put by the defendant on the said rooms and trespassed thereupon and therefore the defendant had to lodge complaint with the police. The police on verifying his complaint arrested the plaintiff and allowed the defendant to re-lock his premises. While admitting that the plaintiff has filed a complaint under Section 145 of Cr.P.C. before the Magistrate, the defendants contend that no orders have been passed in that complaint. The defendants contend that the plaintiff's suit is false and frivolous and therefore claims dismissal of the suit.

8. In view of these pleadings, the following issues are framed against which I have recorded my findings for the reasons given below :-

	ISSUES	FINDING
1.	Whether the plaintiff proves that the suit premises consist of three rooms having an area of 18 1/2′ x 28′ ?	In the negative.
2.	Whether the plaintiff proves that the original defendant namely, Jal Eruchsha Mallu was never in possession of the suit premises or any part thereof ?	In the negative.
3.	Whether the plaintiff proves that Feroze Mallu was gratuitous licensee in a portion of the suit premises ?	In the negative.
4.	Whether the plaintiff proves that he is tenant of the suit premises comprising of three rooms ?	In the negative.
5.	Whether the plaintiff proves that he has been in exclusive possession of the suit premises since 1979 ?	In the negative.
6.	Whether he defendant proves that Room No. 10/A/1 is a single room admeasuring 80 sq. ft. only as stated in paragraph 12 of the written statement ?	In the affirmative.
7.	Whether the defendant proves	In the

	that Firoze Mallu was in possession and occupation of two rooms bearing Nos.10/A/2 and 10/C/2 as stated in paragraph 2 of the written statement ?	affirmative.
8.	What order and reliefs ?	Suit is dismissed with no order as to costs.

ISSUES NOS. 1 TO 7. :

9. For the sake of convenience, I take into consideration all these issues togehter as they revolve around
the main issue whether the suit premises bearing No.10/A/1 consist of one room or three rooms and whether the plaintiff was in occupation of the suit premises since 1979.

10. For the sake of convenience, it would be apt to refer to the rough sketch of the premises annexed to he plaint at Exhibit "A". It has been submitted at the Bar that there is no dispute that the portion indicated by letters ‘A’, ‘B’, ‘C’ & ‘D’ in rough sketch at Exhibit "A" to the plaint has been in possession of the plaintiffs and that he dispute is with regard to the remaining two rooms. Thus, what needs consideration is whether the suit premises which is numbered as 10/A/1 consists of only one room or three rooms as alleged by the plaintiffs.

11. The plaintiffs have led the evidence of Najmabegum who is the widow of the original plaintiff who had taken the premises on rent. Another witness examined by the plaintiffs is Ravinchandra Doshi (PW.2) who is Architect and Registered Engineer and who had drawn the sketch of the premises. On the side of the defendant, one Mr.Kapadia, the Constituted Attorney of the defendant has been examined besides the evidence of Rajen Ajmera, of the trustees of the landlord Trust. Both the parties have adduced documentary evidence.

12. There is no dispute that the plaintiffs have been residing in the premises numbered as 10/A/1 since 1979. Najmabegum (PW.1) states that her husband and his brother had taken the premises on tenancy and after the death of her husband, his brother and her family are continuing as tenant. She states that they have been paying rent and the rent receipts are produced. She further states that originally there were two rooms and thereafter her husband put up partition and made it into three rooms. Next to the premises numbered as 10/A/1, there is another room numbered as 10/B/2 and it was occupied by one Feroze Mallu, who died in 1988. It is after the death of Feroze Mallu, his brother Jal Mallu claimed to have become tenant in respect of Room numbered as 10/B/2.

She further states that in 1979, her deceased husband filed a suit in the City Civil Court, Bombay, being Suit No.5283 of 1979 claiming for injunction against Feroze Mallu restraining him from disturbing repairs of one room. She further states that in the year 1980, her mother had acquired tenancy of the adjoining Room No.10/B/2 and after her death, her husband and herself continued to be in possession of the premises numbered as 10/B/2. She further states that in 1979, while her husband was repairing the wall of Room No.10/A/1, the B.M.C. had issued notice and, therefore, her husband had filed Suit No.6033 of 1979. She also states that Feroze Mallu was merely permitted by her husband to keep one cot in one room of 10/A/1 as he was alone. Feroze Mallu was not charged anything for keeping the cot. She further states that Feroze Mallu died in 1988 and about two months thereafter the deceased original defendant suddenly came with the policeman, broke open the lock and lodged a false complaint against her husband. Her husband was arrested by the police and taking advantage thereof, the original defendant locked the plaintiffs' room and removed articles belonging to the plaintiffs by trespassing in the said portion of the premises. It is in this manner that the original defendant came to occupy the part of the suit premises.

13. As against this, the defendants' witness, Kapadia has stated that the disputed two rooms were numbered as 10/C/2 and they were given on tenancy basis first to the grandfather of the original defendant and thereafter it stood in the name of Mallu Cawasji. The suit premises were in possession of Feroze mallu and Jal Mallu and after the death of Feroze Mallu in 1988, the suit premises were in possession of Jal Mallu. He states that the premises No.10/A/1 which is in possession and occupation of the plaintiffs is only a single room admeasuring around 80 sq. ft. He further states that in the year 1979, the suit building was taken over by the Repair Board for repairs. The deceased Feroze Mallu had allowed the contractor to store his material in part of the premises occupied by him. He states that the plaintiffs are playing fraud by describing the tenement No. 10/A/1 as consisting of three rooms with the intention to usurp the two rooms which are adjoining the said tenement No.10/A/1.

14. One of the trustees, Rajen Ajmera has given evidence in favour of the defendants. He states that he is personally aware of the facts of the case since he became trustee of the Trust. According to him, the tenement No.10/A/1 is only a single room. Room No.10/C/2 comprised of two rooms adjoining to the

premises numbered as 10/A/1. He further states that original bill was in the name of Kavasji Mallu, father of Feroze Mallu. He further states that Room No.10/A/1 has separate entrance from the other side.

15. It is pertinent to note that Najmabegum, the plaintiff's witness has admitted in cross-examination that tenement No.10/A/1 is one single room and in between there is partition wall. She also further states that another room No.10/B/2 was taken by original plaintiff's mother on lease in 1981 an the total area of 10/A/1 and 10/B/2 is 28' x 18'. It is pertinent to note that she further admits that her husband had made a statement in the plaint filed in the City Civil Court, Bombay, numbered as Suit No.5283 which was the suit premises numbered as 10/A/1 was 7.5' x 17 ' and that mention is correct. She also further admits that the same area of one single room was given by her deceased husband in a suit filed against B.M.C., being Suit No.6033 of 1979. There is documentary evidence in support of the defendant's contention that the tenement No.10/A/1 was consisting of only one room. At Exhibit "D-1" is the order passed by the City Civil Court on Notice of Motion No.4243 in Suit No.5283 of 1979 wherein also the description of the premises No.10/A/1 has been mentioned as room admeasuring 7' x 17'. At Exhibit

"D-2" is the copy of the plaint of suit filed by the landlord Trust in the Court of Small Causes at Bombay numbered as RAE Suit No.1768 of 1983 wherein the room in occupation of the present plaintiffs described as No.10-A-1 was described as a single room. Thus, it is on the deceased plaintiff's own showing that tenement No.10/A/1 consisted only of a single room admeasuring 7.5' x 17'. It is in this room when he was putting a wall which was objected to by the B.M.C. and therefore, the original plaintiff was required to file a suit. However, the original plaintiff lost that suit.

16. The plaintiffs have produced large number of rent receipts, but they are not of any help to the plaintiffs as the area of the tenement No.10/A/1 has not been mentioned in any of those receipts. What is pertinent to be noted is that the premises No.10/A/1 mentioned in the rent receipts is described as "room" meaning thereby single room. Therefore, these receipts do not help the plaintiffs in showing that the tenement No. 10/A/1 was consisting of three rooms and the total area being 18 1/2' x 28'.

17. It is pertinent to note that the plaintiffs' case is that Feroze Mallu was never a tenant in the said building and was never a tenant in respect of any of

the premises situated in the said room. However, as stated above, the case of the defendant is that Feroze Mallu's father was a tenant in respect of 10/C/2 which consists of two rooms. In support thereof, the rent receipts are produced at Exhibit "D-14" which mention the name of Cawasji Mallu, father of Feroze Mallu and the tenement is described as 10/A/1. Therefore, I do not find any substance in the case of the plaintiffs that Feroze Mallu was never a tenant and that he was only allowed to keep a cot in their own premises. The case of the defendant has also been supported by the landlord to say that the premises 10/A/1 which was let out to the original plaintiff consisted of only one room and it was admeasuring about 100 sq. ft. Much was made on behalf of the plaintiffs that at one stage the case of the defendant is that tenement 10/A/1 was admeasuring 80 sq. ft. and witness of the defendant has stated it was 100 sq. ft. This however, does not make much difference because the area is not exactly measured, but it is mentioned approximately. The evidence of P.W.2 Doshi is of no help to the plaintiff. He has only drawn the sketch of the premises on the basis of information given to him by the plaintiffs. In fact, we are concerned with the position that prevailed when the suit was filed and not the one subsequent to the filing of the suit. Specific admissions given by the P.W.1 makes it clear

that the suit premises of 10/A/1 consisted of one room only and not three rooms. .

18. Under these circumstances, the plaintiffs has failed to prove that the suit premises consist of three rooms and having area of 18 1/2′ x 28′. As against this, the defendants have proved that the area of the suit premises which is numbered as 10/A/1 is only single room admeasuring 80 sq. ft. It has also been established by the defendants that Feroze Mallu was in possession of the two rooms right from the death of his father.

19. Under these circumstances, the Issues Nos. 1, 2, 3, 4 and 5 are answered in the negative and issue Nos. 6 and 7 are answered in the affirmative. Consequently, the plaintiffs are not entitled to any relief and the suit deserves to be dismissed.

20. The Suit is, therefore, dismissed. No order as to costs.

(S.K.SHAH,J.)

21. The learned Counsel for the Plaintiffs requests

for continuing the interim order for a period of eight weeks. Interim order to continue for a period of eight weeks. Thereafter the Receiver shall stand discharged if no orders from the Appellate Court.

(S.K.SHAH,J.)